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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL–CIO, ET AL., PETITIONERS

v.

ALBERTA SCHERMERHORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted pursuant to the Court's order of June 3, 1963, inviting the Solicitor General to file a brief expressing the views of the Government.

QUESTION PRESENTED

Whether State courts have jurisdiction to enjoin the enforcement of an agency shop contract that violates a State law applicable to such contracts by virtue of Section 14(b) of the National Labor Relations Act.

STATEMENT

Retail Clerks Local 1625 is the certified collective bargaining representative of several thousand employ-

ees of Food Fair Stores, Inc., in five Florida counties (R. 2, 13). Food Fair is a large interstate retail food store chain, over which the Board has regularly asserted jurisdiction. In October 1960, the Union and Food Fair negotiated a collective bargaining agreement containing an "agency shop" clause, which provided that employees covered by the contract who might choose not to join the Union "shall be required to pay as a condition of employment, an initial service fee and monthly service fees" to the Union. (R. 13, Art. 19, Sec. 2, p. 16.)[1] In November 1960, four non-union employees in the bargaining unit brought suit in the Florida Circuit Court for Dade County seeking (i) a declaration that the agency shop clause was illegal, (ii) an injunction preventing Food Fair and the Union from requiring them or other employees covered by the agreement to pay money under that clause, and (iii) an accounting (R. 5–6). It was alleged that the agency shop clause violated Section 12 of the Declaration of Rights of the Florida Constitution which provides in part that, "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization * * *" (R. 4).

The trial court held that the agency shop clause did not violate the Florida Constitution and dismissed

[1] The clause states that these fees are to be paid "for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit" (R. 13, Art. 19, Sec. 2, p. 16).

the complaint (R. 14–15). On direct appeal, the Florida Supreme Court reversed, ruling that the agency shop clause violated the Florida Constitution (R. 19–31). The Court further held that since the agency shop was a form of union security within the scope of Section 14(b) of the National Labor Relations Act, the State courts had jurisdiction to afford a remedy for the violation of State law (R. 24).

This Court granted certiorari and set the case down for argument following *National Labor Relations Board* v. *General Motors Corporation* (371 U.S. 908). In *General Motors*, 373 U.S. 734, the Court held that the agency shop is a form of union security permitted by the proviso to Section 8(a)(3) of the Act, at least where it is valid under State law. In the instant case, the Court held that the agency shop is also a form of union security that the States may prohibit under Section 14(b). The Court reserved decision upon the question of (pp. 747–748) "whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the State's prohibition against such arrangements." The Court then set the case down for reargument, and invited the Solicitor General to file a brief expressing the views of the Government. 373 U.S. 746.

SUMMARY OF ARGUMENT

I

A. (1) The words of Section 14(b) strongly favor the view that the States have power to enforce, and

not merely to enact, right-to-work prohibitions. The interpretation of Section 14(b) proposed by petitioner—that a State may enact substantive law prohibiting union security contracts but may not implement its own law—would be a unique and unprecedented division of State and federal authority. So radical an innovation would surely have drawn more attention in the Congressional debates and have been more clearly expressed in the statute.

(2) The legislative history of Section 8(3) of the original Wagner Act and Sections 8(a) (3) and 14(b) of the Taft-Hartley Act shows beyond peradventure that Congress intended to leave the States free to exercise full concurrent jurisdiction over union security agreements. The Senate Report on Section 8(3), and the comments of Senator Wagner and others on the floor, make plain that the proviso to Section 8(3) left unaffected the States' pre-existing power to enact and enforce prohibitions upon the closed shop and other forms of union security. On the eve of the Taft-Hartley Act, 12 States had enacted "right-to-work laws" enforcible by a variety of sanctions—injunctions, damage suits, criminal fines, and imprisonment. Congress was thoroughly informed about these laws during the Taft-Hartley debates; and the committee reports, as well as statements on the floor by Senator Taft and Representative Hartley, unmistakeably demonstrate that Con-

gress intended to preserve to the States all powers, remedial as well as substantive, which they had hitherto exercised. The sole purpose of Section 14(b) was to dispel any possible inference that Congress, by prohibiting the closed shop and regulating the union shop, had thereby limited the traditional role of the States.

There was no contemporaneous doubt about the intent and effect of Section 14(b). Less than two years after its enactment, the Court, in *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, held that under Section 14(b) the States had jurisdiction to enact and enforce laws prohibiting union security agreements. Contemporaneous commentators all expressed the view that Section 14(b) was intended to avoid ousting the States of jurisdiction over union security agreements. In the ensuing nationwide debate over right-to-work laws, we have never seen it suggested that the States have no power to enforce their own laws because the National Labor Relations Board is charged with that function.

B. (1) To recognize State jurisdiction to enjoin, redress, or punish the "execution or application" of contracts requiring union membership as a condition of employment will not interfere with the exercise of the federal right to engage in strikes, picketing or other concerted activities. Plainly, the power of the States does not extend to adjudicating disputes over union organization or representation merely because there is a claim and perhaps some evidence that the

ultimate, though remote and uncertain, objective of the union's picketing was to secure the employment of union labor. *Local Union 438, Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542; *Local Union 429, Electrical Workers* v. *Farnsworth and Chambers Co.*, 353 U.S. 969. Indeed, it is arguable that the States have no jurisdiction over peaceful strikes and picketing under any circumstances, but are limited to applying sanctions against the actual execution of union-security contracts and discharges thereunder. But wherever the precise line be drawn, the opportunities for separating State jurisdiction over the execution and application of the forbidden agreements from the exclusive Board jurisdiction over concerted activities protected by Section 7 are more than adequate to show that State power in the former instance carries no serious threat to implementation of national labor policies in the latter.

(2) Nor will the framing of divergent State remedies for the "execution or application" of a union security contract in violation of State law interfere with the national labor policy. The exclusivity of the Board's jurisdiction, including the exclusivity of its remedial powers, rests upon the need for ensuring that the substantive rules laid down by Congress are given uniform application. *Garner* v. *Teamsters Union*, 346 U.S. 485, 490. Since in the field of union security, the controlling substantive regulations admittedly are fashioned, not by Congress, but by the several State legislatures, the need for exclusive federal remedies and procedures does not arise.

(3) Even if conduct which violates a State right-to-work law were automatically a federal unfair labor practice, concurrent State jurisdiction would not unduly impede the Board's administration of Sections 8(a)(3) and 8(b)(2). The States regularly exercise a measure of concurrent jurisdiction over many types of conduct—*e.g.*, violence, secondary boycotts, and breaches of collective bargaining agreements—which would also constitute an unfair labor practice cognizable by the Board. In the face of these examples, the possibility of inconsistent determinations in a controversy over union security is not persuasive that Congress, despite all the history to the contrary, must have intended to deprive the States of jurisdiction to remedy violations of their own right-to-work laws.

II

Although the Board has never decided the question, and it need not be decided in the present case, we submit that the execution and application of a collective bargaining agreement satisfying the conditions of the proviso to Section 8(a)(3) is not a federal unfair labor practice even if it violates state law. Concededly, the words of the statute will bear a contrary construction. Moreover, there are other occasions upon which the Board is required to take State law into account in administering the provisions of the Act. See *Fort Industry Co.*, 77 NLRB 1287, 1299; *Giant Food Shopping Center, Inc.*, 77 NLRB 791. However, the spontaneous under-

standing of Section 14(b) is only that it prevents any employer or labor union from defeating the normal application of State law prohibiting union security agreements by claiming that the agreement was "authorized" by federal law. And the foregoing cases do not provide precedents for treating a violation of State law as *ipso facto* a violation of the federal Act.

The accepted practice of using the processes of the Board to enforce federal policy and leaving the enforcement of State right-to-work laws to the States is supported by a number of persuasive considerations: First, it is inherently unlikely that Congress would have wished to make the federal agency an instrument of State policy. Second, nothing in the legislative history indicates that Congress intended to put federal sanctions behind State laws. Third, the compelling inference that Congress intended the States to have jurisdiction to enforce their own laws prohibiting union-security agreements adds strength to the foregoing considerations. Whatever advantages might be claimed for having State prohibitions enforced exclusively by a centralized federal agency are absent if the State courts have current power to adjudicate controversies involving union security agreements. Indeed, on the latter assumption, it is difficult to see what conceivable object of national labor policy would be served by adding the sanctions of the Board to sanctions already available in the State courts for the enforcement of State laws more restrictive than national policy.

ARGUMENT

INTRODUCTION

The question presented—whether a State has jurisdiction to grant relief against a union-security contract prohibited by State law—involves several related provisions of the National Labor Relations Act. Section 8(a)(1) provides that it shall be an unfair labor practice for an employer—

> to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.

Among those rights is the right to form, join or assist a labor organization or to refrain from such activities.

Section 8(a)(3) provides that it shall be an unfair labor practice for an employer—

> by discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment. * * *

Section 8(b)(2) makes it an unfair labor practice for a labor organization—

> to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *

Finally, Section 14(b) provides—

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Without the proviso to Section 8(a)(3) an employer and a labor organization representing employees in an industry affecting interstate commerce would both commit an unfair labor practice by executing and applying a union shop agreement. The proviso gives them that privilege, at least in the absence of anything to the contrary in State law, provided that the conditions laid down in the proviso are met.

The Court's opinion of June 3, 1963 (373 U.S. 746), raises two related questions concerning the interplay between these provisions and Section 14(b):

> (1) Does Section 14(b) make compliance with State law a further qualification to the proviso of Section 8(a)(3) so that the privilege of executing a union security contract without violating Section 8(a) (1) and (3) and Section 8(b)(2) depends in part upon a showing that the contract is not prohibited by State law?

(2) Has a State jurisdiction to grant remedies to persons injured or threatened with injury by a union security contract that violates the State's laws?

Only the second question is squarely presented by the instant case. The first bears upon it, as the Court pointed out, for if State law is irrelevant in the National Labor Relations Board's administration of Sections 8(a) (1) and (3) and 8(b)(2), then there are few problems of concurrent jurisdiction and the only remedies for violation of the State's substantive law are those provided by the State. On the other hand, if the national Board is to take State law into account in administering the federal Act, there is less need for State remedies and their existence might create somewhat more danger of interference with the federal labor policy and its administration.

Nevertheless, we believe it more appropriate to come directly to the question, does Section 14(b) allow the States to provide their own remedies for violation of State right-to-work laws. Both questions depend upon the intent of Congress. No one doubts either the power of Congress to provide that federal law shall not exclude State jurisdiction, or its authority to make the existence of an unfair labor practice redressable by the federal agency turn partly upon State substantive law. In the present situation, the one purpose that we find unmistakeably clear in the legislative history and adequately expressed in the statute is the intent of Congress to leave the States free to adopt and enforce their own laws concerning union-

security contracts, independently of the National Labor Relations Act. This State jurisdiction includes, we believe, the power to prevent or punish the actual execution or application of a union-security contract, and to award damages for a violation, but it does not extend to *any* conduct that is found to tend towards violation, for that would plainly interfere with exclusive federal jurisdiction over other aspects of labor-management relations.

The more doubtful question, whether the Board is to give effect to State law in administering Sections 8(a) (1) and (3) and 8(b)(2), should be resolved when the issue actually arises, with that clear intention not to oust the States of jurisdiction as a predicate, instead of facing the doubtful question without the guidance of the related intent.

Accordingly, we present first our reasons for urging that the States have jurisdiction to grant relief for violation of their own laws prohibiting union-security contracts. We then submit that, even if the execution and application of a union-security contract which violates State law is a federal unfair labor practice, the exercise of concurrent State jurisdiction to prohibit violations of State right-to-work laws would not result in such interference with the Board's operations as to justify concluding that the States may not also afford a remedy. Finally, we suggest that, if the Court feels the question must be decided, State law should be held irrelevant in the administration of Sections 8(a)(1) and (3) and 8(b)(2), with the result that the States will redress violations of

State law and the federal agency will redress only violations of federal law, as has been the uniform practice since 1947.

I

THE NATIONAL LABOR RELATIONS ACT DOES NOT PREEMPT THE JURISDICTION OF THE FLORIDA COURTS TO ENJOIN ENFORCEMENT OF AN AGENCY SHOP AGREEMENT

A. THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 14(b) DEMONSTRATE THAT CONGRESS LEFT THE FIELD OPEN FOR STATE REMEDIES FOR THE VIOLATION OF STATE LAWS PROHIBITING UNION SECURITY AGREEMENTS

1. Although the language may be open to either interpretation, the words of Section 14(b) strongly favor the view that Congress thereby left the way open for a State to assert jurisdiction to deal with a union security contract according to State law even though the employer and labor union were covered by the National Labor Relations Act. In the absence of federal law, there could be no doubt of the State's jurisdiction. Congress was not legislating in 1947 against an elaborate background of decisions, such as exist today, giving the NLRB exclusive jurisdiction as against State regulation of labor-management relations.[2] State law alone had governed both collective agreements and strikes and picketing. The States had been exercising a measure of concurrent jurisdiction over unfair labor practices and questions of rep-

[2] E.g., *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, and cases cited.

resentation.[3] The only troublesome question appeared to be whether the federal statute would exclude the operation of State law by authorizing the execution of some forms of union security agreements and prohibiting others. Compare *Hill* v. *Florida*, 325 U.S. 538, which was, in 1947, the leading decision upon federal preemption in the field of labor-management relations. The words of Section 14(b) simply and directly negate any implication that the federal law granted authority to execute union security contracts notwithstanding State law, viz—

> Nothing in this Act shall be construed as authorizing the execution or application of [union security] agreements * * * in any State or Territory in which such execution or application is prohibited by State or Territorial law.

The use of the word "authorize" in Section 14(b) is doubtless to be attributed partly to reasoning of the Court in *Hill* v. *Florida, supra*,[4] and partly to the fact that the danger of an inference of federal preemption would be increased by the provision in Section 9(e) of the original Taft-Hartley Act for federally-conducted elections to ascertain whether a majority of the employees wished "to authorize" the negotiation of a union shop agreement. With any implied au-

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[3] *Davega City Radio, Inc.* v. *State Labor Relations Board*, 281 N.Y. 13, 22 N.E. 2d 145; *Wisconsin Labor Relations Board*, v. *Fred Rueping Leather Co.*, 228 Wisc. 473, 279 N.W. 673. But cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767.

[4] The Court concluded (p. 542) that "The collective bargaining which Congress has *authorized* contemplates two parties free to bargain, and cannot thus be frustrated by state legislation." [Emphasis supplied.]

thorization thus negated, the Act left the States their original jurisdiction.

The interpretation of Section 14(b) proposed by petitioner, that a State may enact substantive law prohibiting union security contracts but may not enforce its own law, would be a unique division of State and federal authority having no precedent in our legal history. Congress has sometimes preempted fields of regulation and sometimes left the way open for concurrent State regulation, but we are aware of no instance in which Congress has authorized the States to establish the applicable substantive law yet forbade them to provide sanctions. The absorbtion of State law where the United States has exclusive territorial jurisdiction is an altogether different matter. If Congress had intended so radical an innovation, in a field susceptible of concurrent regulation, the plan would surely have drawn more attention in the debate and have been more clearly expressed in the statute.

For there were much simpler and more direct ways of giving effect to the intent that petitioner attributes to Congress. If all that was intended was to add a further qualification to the proviso to Section 8(a)(3) for the purposes of federal law, so that a union security contract which violated State law would be an unfair labor practice under Sections 8(a)(1) and (3) and 8(b)(2), then Congress could easily have inserted into the proviso the initial condition—

> (i) if such agreement is permitted by State or Territorial law;

and then have numbered the other conditions (ii) and

(iii).[5] It seems significant, therefore, that Congress chose to deal with State law in a separate section, entitled "Limitations," one subsection of which expressly bars the States from compelling employers to bargain with supervisors while the other preserves State power to prohibit union security agreements.

2. The legislative history of Section 8(3) of the original Wagner Act and of Sections 8(a) (3) and 14(b) of the Taft-Hartley Act shows beyond peradventure that Congress intended to leave the States free to exercise full concurrent jurisdiction over union security agreements.

Prior to the Wagner Act, the States had unquestioned power to enact and enforce prohibitions and restrictions upon the closed shop and other forms of union-security agreement. The proviso to Section 8(3) made it plain that nothing in the Wagner Act or any other federal law should preclude an employer from making such an agreement with a union properly designated as the employees' representative, but it left State power unaffected. The legislative history makes that purpose plain. The Senate Report on the bill which was ultimately enacted stated:

> The proviso attached to the third unfair-labor practice deals with the question of the closed shop. Propaganda has been widespread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propaganda is absolutely false. The reason for the insertion of the proviso is as follows: According to some interpretations; the provision of section 7(a) of the National Industrial Recovery Act, as-

[5] For the history of such a draft, see pp. 54–55, *infra*.

suring the freedom of employees "to organize and bargain collectively through representatives of their own choosing," was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote section 7(a); that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.

* * * In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now legally be consummated. * * *

The House Report contained similar language:

* * * The proviso does not impose a closed shop on all industry; it does not give new legal sanctions to the closed shop. All that it does is to eliminate the doubts and misconstructions under this bill * * * The bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-

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• S. Rep. No. 573, 74th Cong., 1st Sess. 11-12, 2 Leg. Hist. of the NLRA, 1935 (G.P.O., 1949) 2311.

Similarly, a memorandum comparing S. 1958, the bill which was enacted, with an earlier bill pointed out (1 Leg. Hist. (1935) 1353): "The proviso does not make closed-shop agreements legal; it merely says that nothing herein should illegalize them. The operation of State common law on the subject is left unaffected."

> shop agreements in the States where they are legal. * * *[8]

In support of the bill in the Senate, Senator Wagner stated that the proviso:

> * * * does no more than to legalize a closed shop agreement * * * where it is now sustained by the public opinion of the State.
>
> * * * * * *
>
> The provision will not change the status quo. That is the law today; and whenever it is the law today that a closed-shop agreement can be made, it will continue to be the law. By this bill we do not change that situation. * * *[9]

Similarly, Representative Connery, manager of the bill in the House, in response to a charge that the proviso would make it possible for 51 percent of the employees to bring about the discharge of the other 49 percent, declared:

> * * * The closed-shop proposition in this bill does not refer to any State which has any law forbidding the closed shop. It does not interfere with that in any way.[10]

At the time the Wagner Act was passed, State prohibitions in the union-security field generally took the form of common-law adjudications holding the closed shop to be an illegal object of a strike or picketing, and they were enforcible by injunctive remedies.[11] By 1947, however, 12 States had enacted statutes or

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[8] H. Rep. No. 969, 74th Cong., 1st Sess., 17, 2 Leg. Hist. (1935) 2997.

[9] 79 Cong. Rec. 7673, 2 Leg. Hist. (1935) 2394-2395. See also 79 Cong. 7570, 2 Leg. Hist. (1935) 2335.

[10] 79 Cong. Rec. 9726, 2 Leg. Hist. (1935) 3217.

[11] See Frankfurter and Greene, *The Labor Injunction* (1930), pp. 29-30.

constitutional prohibitions outlawing or restricting the closed shop and other forms of union-security agreement.[11] These "right-to-work" laws were enforcible by a variety of sanctions—injunctions, damage suits, criminal fines, and (in three instances) imprisonment. Congress was thoroughly informed about State right-to-work laws during the Taft-Hartley debates.[12] The legislative history unmistakeably demonstrates that Congress did not intend to abandon the Wagner Act's policy of putting no federal obstacle in the way of the enactment and enforcement of such State legislation.

The chief innovations wrought by the Taft-Hartley Act in the union security field were to outlaw the closed shop as a matter of federal law and restrict the execution and application of union shop contracts. The changes were accomplished by retaining the language of the original proviso to Section 8(3) that—

> nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein

but adding a number of qualifications. One permitted the contract to require membership only after

[11] *State Laws Regulating Union-Security Contracts*, 21 LRRM 66. The constitutionality of these laws was sustained in *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949).

[12] E.g., H. Rep. No. 245, 80th Cong., 1st Sess. 34, 1 Leg. Hist. of the LMRA, 1947 (G.P.O., 1948) 325; S. Rep. No. 105, 80th Cong., 1st Sess. 6, 1 Leg. Hist. (1947) 412; Hearings before Commitee on Labor and Public Welfare, U.S. Senate, 80th Cong., 1st Sess., on S. 55 and S.J. Res. 22, pp. 64–67, 806–807.

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30 days of employment. A second required a certificate by the Board that at least a majority of the employees eligible to vote in an election under Section 9(e) shall have voted "to authorize" such labor organization to make such an agreement.[13] Another proviso limited the occasions upon which a discharge might be justified by a union security agreement.

Since Congress was thus undertaking, for the first time, to regulate the subject of union security, there was fear that its entry into the field might be construed to extinguish the power of the States to regulate arrangements falling within the federal proviso. Such an inference, to be sure, seemed implausible to some observers in view of the widespread recognition that the Wagner Act proviso had not been intended to override more restrictive State laws even though the Wagner Act, too, had contained a comprehensive prohibition against discriminatory conduct by employers. At that time, as we have said, there was no substantial body of decisions asserting broad federal occupation of the field of labor-management relations and the practice favored concurrent State jurisdiction. The Senate Labor Committee believed it unnecessary to add a special provision disclaiming intent to preempt the field of union security agreements (*infra*, p. 24). The House Labor Committee was more cautious and included in its bill a Section 13 (which, as revised in conference, became Section 14(b)):

> Nothing in this Act shall be construed to invalidate any State law or constutitional pro-

[13] This provision was subsequently repealed. Act of October 22, 1951, 65 Stat. 601.

> vision which restricts the right of an employer to make agreements with labor organizations requiring as a condition of employment membership in such labor organization, and all such agreements, insofar as they purport to impose such requirements contrary to the provisions of the law or constitution of any State, are hereby divested of their character as a subject of regulation by Congress under its power to regulate commerce among the several States and with foreign nations, to the extent that such agreement shall, in addition to being subject to applicable preventive provisions of this Act, be subject to the operation and effect of such State laws and constitutional provisions as well."[14]

This cumbersome language obviously disclaims, in the most unmistakable terms, any impairment of State jurisdiction to enact and apply laws regulating or prohibiting union-security contracts. The House Report described the provision as follows:

> SECTION 13. Since by the Labor Act Congress preempts the field that the act covers insofar as commerce within the meaning of the act is concerned, and since when this report is written the courts have not finally ruled upon the effect upon employees of employers engaged in commerce of State laws dealing with compulsory unionism, the committee has provided expressly in section 13 that laws and constitutional provisions of any State that restrict the right of employers to require employees to become or remain members of labor organizations are

[14] Sec. 13 of H.R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. (1947) 207–208.

> valid, notwithstanding any provision of the National Labor Relations Act. In reporting the bill that became the National Labor Relations Act, the Senate committee to which the bill has been referred declared that the act would not invalidate any such State law or constitutional provision. The new section 13 is consistent with this view.[15]

Elsewhere, the House Report referred to Section 13 as "a special provision * * * to give the States a concurrent jurisdiction in respect of closed-shop and other union-security arrangements."[15a] At still another point, the Report stated:

> * * * *by section 13 the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States,* notwithstanding that the agreements affect commerce, and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal law. * * *[16] [Emphasis added.]

If Section 13 of the House bill had been enacted without change, there could be no question of the power of the States to enforce their right-to-work prohibitions.

The Conference Committee substituted for Section 13 of the House bill the more concise language now found in Section 14(b). Petitioners find significance in the change and asks the Court to infer that Con-

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[15] H. Rep. No. 245, 80th Cong., 1st Sess. 44; 1 Leg. Hist. (1947) 335.

[15a] H. Rep. No. 245, *supra*, 40; 1 Leg. Hist. (1947) 331.

[16] H. Rep. No. 245, *supra*, 34; 1 Leg. Hist. (1947) 325.

gress abandoned the plan to allow the States concurrent jurisdiction (Br. p. 22). The legislative record belies the contention. The House Conference Report clearly and explicitly states that no change in substance was intended:

> Under the House bill there was included a new Section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to state law. Many states have enacted laws or adopted constitutional provisions to make all form of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act * * * to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called "closed shop" proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. *The conference agreement, in section 14(b), contains a provision having the same effect.*[17] [Emphasis added.]

[17] H. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. (1947) 564.

In the Senate, Senator Taft gave the principal exposition of the Conference Report. He too made it clear that the intent of section 14(b) was to give continuing effect to the previous policy of avoiding federal interference with the enforcement of State laws prohibiting union security agreements:

> * * * in the report of the [Senate Committee], we stated that * * * there was nothing in the bill as originally reported by the committee which in any way would invalidate the provisions of a State law prohibiting the closed shop. * * * In it we pointed out that when the National Labor Relations Act was enacted, it was made clear in the report at that time that the proviso in section 8(3) was not intended to override State laws regulating the closed shops. At that time the Senate Committee stated that the bill did nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal.
>
> In other words, the whole spirit of the Wagner Act and its provisions would prohibit a closed shop, because it prohibits discrimination against people who are not members of labor unions. In order to preserve that right and to keep the Wagner Act itself from abolishing the closed shop everywhere, it was necessary to write in this proviso. *But that did not in any way prohibit enforcement of State laws which already prohibited closed shops.*
>
> *That has been the law ever since that time. It was the law of the Senate bill; and in putting in this express provision from the House bill,*

> *we in no way change the bill as passed by the Senate.* * * *[18] [Emphasis added.]

And, in the House, there was the following colloquy between Representatives Kersten and Hartley with apparent reference to Section 14(b) (93 Cong. Rec. 6383–6384, 1 Leg. Hist. (1947) 883):

> Mr. KERSTEN. * * * I would like to ask the gentleman about that portion which pertains to the validity of State laws. We are very anxious that disputes be settled at the State level insofar as it is possible. * * *
>
> Mr. HARTLEY. That is the sense of the language of the bill and of the report. *That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws.* * * * [Emphasis added.]

In the face of these comments by the co-sponsors and architects of the Taft-Hartley Act, it is difficult to see how any Senator or any Representative who sup-

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[18] 93 Cong. Rec. 6519–6520, 2 Leg. Hist. (1947) 1596–1597. Senator Barkley added (93 Cong. Rec. 6520, 2 Leg. Hist. (1947) 1597–1598: "The provision of the measure which exempts any State from the operation of its provisions, if such State has outlawed the closed shop, therefore in effect adopts the State as the agency through which the regulation of interstate commerce shall take place, insofar as the closed shop is regulated. * * * * All that the legislatures need to do in order to impose a ban against all closed shops throughout the United States is to meet and to say, 'We will not have any in this State,' and thereby both in interstate commerce and intrastate commerce the closed shop will be banned, and the employees will not even be able by an election to establish a union shop. * * *".

ported the Act could possibly have regarded his vote as a vote to take away from the States the power to enforce their own "right-to-work" laws.

Petitioners argue (Pet. Br. 19) that the legislative history contains no evidence that Congress considered and then decided to "confer remedial jurisdiction" on the State courts for violations of their right-to-work laws. That contention frames the issue in a wholly misleading form. The question is not whether Congress decided to "confer" remedial jurisdiction; the question is whether it made a deliberate choice to take away from the States the jurisdiction, both substantive and remedial, that they were already exercising, leaving them the novel right to make declarations of substantive policy to be enforced by a federal agency. Nothing in the legislative history lends the slightest support to that inference. On the contrary, Senator Taft's emphatic assertion that the Act he sponsored, like the Wagner Act, "did not in any way prohibit enforcement of" State right-to-work laws (*supra*, p. 24), and Representative Hartley's assurance that "this will not interfere with the State of Wisconsin in the administration of its own laws" (*supra*, p. 25) leave no doubt that the States remained free to effectuate, and not merely to announce, their legislative decisions.

Nor is there any merit in petitioners' suggestion that if Congress had intended the States to apply the varied sanctions, critics of the bill would have expressed specific opposition (Pet. Br. 19). One important critic, Senator Barkley, did attack Section 14(b) on the ground that it "in effect adopts the State

as the agency through which the regulation of interstate commerce shall take place, insofar as the closed shop is regulated" (93 Cong. Rec. 6520, 2 Leg. Hist. (1947) 1597). Senator Morse also objected that "This amendment [Section 14(b)] proposes that we exempt from the national policy, as it relates to interstate commerce, national jurisdiction over these matters as they involve the closed shops and union shops, in the case of any State which passes an anti-closed shop or anti-union shop bill." (93 Cong. Rec. 6456; 2 Leg. Hist. (1947) 1561). It is clear that any opponent of the bill who would have voiced objection to an explicit grant of remedial power to the States would also have spoken out against Section 14(b) as written, for in light of the debates no one could have doubted the substantial "danger," at least, that the amendment would be construed to allow such an exercise of State jurisdiction.

The obvious fact is that neither supporters nor opponents of the Taft-Hartley Act made the sophisticated distinction between State remedies and State substantive rules which petitioner now proposes; both facets of State power were treated together, and neither was preempted. Petitioner's analysis would transform Section 14(b)—a provision inserted in the Act out of an abundance of caution in order to remove any possible doubt that the States were free to play their traditional role in the union security field—into an instrument of federal preemption.

We recognize that Section 14(b), as thus construed, appears to be a glaring exception to the general rule

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of exclusive federal jurisdiction that now prevails in the case of businesses whose labor relations affect interstate commerce. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, and cases cited; *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448. Section 14(b) has often been criticized upon that ground.[19] We show in the next section that the existence of State power to enforce State right-to-work laws will not greatly interfere with the administration of other sections of the National Labor Relations Act. Furthermore, whatever the anomaly in Section 14(b), the rule of federal preemption is not a constitutional principle binding Congress; it is a determination of legislative intent. The exception could not have seemed nearly as anomalous to Congress in 1947 as it seems today. The doctrine of exclusive jurisdiction had not emerged. The States were applying their own laws to strikes and picketing, and there was little, if any, thought given to the possibility that the enactment of Section 8(b) might occupy the field. States were also exercising concurrent jurisdiction over unfair labor practices. (See pp. 13–14, *supra*.) Federal jurisdiction could not entirely exclude State law from the whole field of labor-management relations, for the States would obviously retain some power to regulate substantive terms and conditions of employment and misconduct such as violence. See *Allen-Bradley Local No. 1111* v. *Wisconsin E.R. Board*, 315 U.S. 740.

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[19] *E.g.*, Cox, *Federalism and the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1317–1320; Wellington, *Labor and the Federal System*, 26 U. of Chi. L. Rev. 542, 548.

There was no contemporaneous doubt about the intent and effect of section 14(b). Less than two years after its enactment, the Court decided *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301. Both the majority and the dissenting justices agreed that under section 14(b) the States had jurisdiction to enact and enforce laws prohibiting union security agreements. Speaking for the Court, Mr. Justice Frankfurter said (pp. 313-314)—

> Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own restrictive policies in the matter of union-security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive. * * *

And later he spoke of "the permission granted the States by § 14(b) of the Taft-Hartley Act to *carry out policies* inconsistent with the Taft-Hartley Act itself." 336 U.S. at 315, italics supplied.

Although Mr. Justice Black and Mr. Justice Douglas, dissenting, concluded that the State could not award back pay to an employee discharged under a contract which the War Labor Board ordered the employer to make, they noted that—

> The Taft-Hartley Act expressly granted the states more leeway in regard to enforcement of their own policies as to contracts of the type here involved. * * *

citing Section 14(b). 336 U.S. at 325.

Within a year after the enactment of Section 14(b) all five members of the National Labor Relations Board joined in the view that Section 14(b) allows the States to exercise jurisdiction over union-security contracts even though the contract accords with federal policy. *Giant Food Shopping Center, Inc.*, 77 NLRB 791. The majority said (p. 793)—

> Section 14(b), therefore, in effect removes all Federal restrictions upon existing and future State legislation prohibiting compulsory unionism insofar as the National Labor Relations Act is concerned, even where such legislation may affect employees engaged in interstate commerce.

After referring to the legislative history, they continued (p. 794)—

> Thus, the legislative history preceding the enactment of Section 14(b) fully supports the otherwise clear language of this provision as establishing the intent of Congress to leave to the exclusive jurisdiction of the States the prohibition of union-shop agreements to the extent that prohibition in this respect now exists or may hereafter exist in such States.

Chairman Herzog and Member Houston also said (p. 798)—

> The debates and Committee Reports antedating the enactment of Section 14(b) suggest * * * that Congress, aware of the Supreme Court's conclusion in *Hill* v. *Florida* and the *Bethlehem Steel* cases that the Federal power is paramount over industries in which labor disputes might impair interstate commerce, intended to make certain that the new Congressional enactment did not operate to prevent the States

> from continuing to enforce *their own* laws concerning union-security agreements. * * *

Contemporary commentators all expressed the view that Section 14(b) was intended to avoid ousting the States of jurisdiction over union-security agreements.[20] In the ensuing nationwide debate over right-to-work laws we have never seen it suggested that the States have no power to enforce their own laws because the National Labor Relations Board is charged with that function.[21]

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[20] CCH Labor Law Reports Edition, *New Labor Law, LMRA, 1947* (1947), pp. 72–73, par. 94; BNA, *The Labor-Management Relations Act of 1947; summary and section-by-section commentary* (1947), p. 25; Feinsinger, *Federal-State Relations Under the Taft-Hartley Act*, 1 N.Y.U. Conf. on Labor (1948), pp. 487–491; Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 Mich. L. Rev. 593, 598–599 (1948); Research Institute of America, *The Taft-Hartley Labor Law, Its Effect on Your Labor Relations* (1947), p. 46; National Association of Manufacturers, *State Power and the Labor-Management Relations Act*, 9 N.A.M. Law Digest 103 (1947); Killingsworth, *State Labor Relations Act*, Univ. of Chicago Press (1948), p. 244; Note, *Union Control Over the Workers' Employment As Affected By the Taft-Hartley Act*, 33 Iowa L. Rev. 539, 552–553 (1948); Note, *Union Security Devices and the Taft-Hartley Act*, 96 U. Pa. L. Rev. 101, 113 (1947). See also Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations*, 59 Col. L. Rev. 6, 41, n., 26.

[21] Coogan, *Voluntary Unionism For Free Americans*, National Right to Work Committee; Morgan, *Union Security—Federal or State Sphere*, 4 Lab. L.J. 815 (1953); Meyers, *"Right to Work" in Practice*, Fund for the Republic (1959); Gibson, *The Legal and Moral Basis of Right to Work Laws*, Address before the Section of Labor Relations Law, ABA, National Right to Work Committee (1955); Toner, *Right to Work Laws: Public Frauds*, 8 Lab. L.J. 193 (1957); Reilly, *States Rights and the Law of Labor Relations*, AEA, Inc. (1955), pp. 16–21; Pollitt, *Right-to-Work Law Issues: An Evidentiary Approach*, National Council for Industrial Peace; CIO *The Case Against Right to Work Laws*, pp. 96–102.

B. STATE JURISDICTION TO ENFORCE STATE LAWS PROHIBITING UNION-SECURITY AGREEMENTS WILL NOT INTERFERE WITH THE ADMINISTRATION OF THE NATIONAL LABOR POLICY TO SUCH AN EXTENT AS TO REQUIRE FEDERAL PREEMPTION IN THE FACE OF THE EVIDENCE OF A CONTRARY CONGRESSIONAL INTENT

At several points State laws prohibiting union-security agreements become closely interrelated with the administration of the National Labor Relations Act. Dual sovereignty invariably leaves some roughness at the joints, and Congress' anomalous decision to allow State intrusion into an area as close to the heart of labor-management relations as union security, even though it otherwise gave the Board exclusive jurisdiction, increases the problems of accommodation. We think it plain, however, that the difficulties are not nearly great enough to justify the conclusion that Congress must be taken, despite the contrary evidence, to have intended to withhold from the States power to enforce their own laws even though they were substantively applicable to employers and unions subject to NLRB jurisdiction.

1. *Recognition of State jurisdiction to punish or enjoin the execution or application of contracts requiring union membership as a condition of employment will not interfere with the exercise of the federal right to engage in strikes, picketing and other concerted activities*

Section 14(b) prevents any preemption of State jurisdiction to deal with "the execution or application" of a contract requiring membership in a union as a condition of employment. The State's authority plainly extends, if it has any power to administer its own law, to enjoining or punishing the execution of a union-security agreement and to awarding damages to

any person injured thereby. Its authority includes refusing to enforce the illegal condition in the courts and to injunctions against discharges for failure to join a union or maintain membership therein. No doubt a State may also award damages to any employee discharged under such a contract or compel an accounting for any payments coerced by threatening loss of employment thereunder.

It seems plain, however, that the States' power does not extend to enjoining *any* conduct which the State finds has a tendency or purpose to bring about the execution of a union-security contract. The point is illustrated by *Local Union 438, Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542. In that case the respondent was a firm of contractors who had undertaken a construction job for the City of Atlanta. Shortly after the work began various unions in the area visited the contractor, whose employees were not represented by a labor union. According to the contractor, the unions pressed for the hiring of union labor, but the unions insisted that their only demand was that the contractor pay the union wage scales prevailing in the area. Subsequently, the petitioner placed a single picket at the construction site. The employees of other contractors on the job refused to work, and the picketing caused difficulty in obtaining delivery of supplies and materials. At *nisi prius* a temporary injunction was denied without opinion. The Supreme Court of Georgia, although it found the picketing to be peaceful and the evidence sufficient to sustain a finding that the contractors were not paying the union wage scale,

nevertheless concluded that the purpose of the picketing was to force the contractor to employ only union labor, which was a violation of the Georgia right-to-work law. This Court reversed, holding upon authority of *Local Union 429, Electrical Workers* v. *Farnsworth and Chambers Co.*, 353 U.S. 969, reversing 201 Tenn. 329, 299 S.W. 2d 8, that the controversy lay within the exclusive jurisdiction of the National Labor Relations Board.

Both *Curry* and *Farnsworth* involved disputes over union organization. To allow State tribunals to take evidence upon the purposes of picketing in a controversy over union recognition or organization and then to issue injunctions whenever convinced that the union's ultimate objective was a closed or union-shop agreement, would seriously interfere with the national labor policy in areas over which Congress left no jurisdiction in the States. Section 7 guarantees the right to engage in concerted activities. Section 8(b) reveals the increasing care with which Congress has restricted *some* uses of economic weapons in connection with organizational activities while scrupulously leaving *other* uses uninhibited. Although the preemption of State authority has the collateral advantages of avoiding conflicting findings and providing the courts with the advice of an expert agency, the basic reason for giving the Board exclusive jurisdiction is that the States might frustrate the national policy by inhibiting conduct that the Act intentionally leaves free." As

" See also, Cox, *Federalism in Labor Law*, 67 Harv. L. Rev. 413, 1315–1317, 1322–1324 (1954).

Mr. Justice Jackson said for a unanimous Court in *Garner* v. *Teamsters Union*, 346 U.S. 485, 499–500—

> The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.[22]

Multiplicity of tribunals is quite as likely to produce disparate law in action, as differences in substantive law. *Garner* v. *Teamsters Union, supra.* Especially in the area of organizational activity the aims and purposes of a strike or picketing are often disputed, poorly defined or ill-expressed. *Farnsworth* and *Curry* are cases in point, for in neither was the object of the picketing quite certain. While the State court found that the union's goal was to have only union members employed on the job, the Board might have found that the purpose of the picketing was to secure recognition as the representative of the employees involved, to persuade employees to join

[22] See also *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 242–243.

the union, or to inform the public that the wage rates on the job did not conform to area standards. The first objective is ultimately within the field of union security encompassed by Section 14(b) and Sections 8(a)(3) and 8(b)(2), but the other three are not.[24] Thus, if the States were permitted to enforce their right-to-work laws against strikes and picketing, there would be grave risk that many courts might find a forbidden union-security objective where the Board would find none imminent, and thus might punish or restrain conduct which the federal Act protects or at least leaves to the free play of economic forces. In order, therefore, to preserve the delicate balance between the interests of labor and management which the Act has drawn, Section 14(b) must be construed in such a way as to give the Board exclusive responsibility in this peculiarly sensitive area.

There is a world of difference between the situations exemplified by *Farnsworth* and *Curry* and any jurisdiction asserted by the Florida courts. Here, the illegal contract has been executed. The complaint alleges that money has been collected from employees under the contract. While the prayers for relief include a request for an injunction against a strike or other activity seeking to compel the employer to comply with the agency shop clause, the heart of the

[24] If pure recognition or organization is the object, the picketing would be regulated by Section 8(b)(7) of the Act, as amended in 1959. If the object is truly "area standards," the picketing would be protected by Section 7 of the Act. See *Claude Everett Construction Co.*, 136 NLRB 321.

relief sought appears to be a declaration of the invalidity of the union-shop clause, an injunction against its application, and an accounting of the monies collected thereunder (R. 6–7). Since the district court dismissed the complaint and the Florida Supreme Court merely reversed and remanded for further proceedings, no one can be certain what relief the complainants may be finally awarded. It is plain, however, that substantial relief within the prayer of the complaint might be granted without in any way interfering with the Board's exclusive jurisdiction over strikes and picketing.

Under these circumstances it would seem unnecessary to decide exactly where the line is to be drawn between the exclusive authority of the national Board and the jurisdiction remaining in the States. Plainly, there is no State power to deal with conflicts over union organization and collective bargaining merely because there is a claim and possibly some evidence that the union's ultimate objective is to secure the employment of union labor. *Local 438, Construction & Laborers Union* v. *Curry, supra; Local 429, Electrical Workers* v. *Farnsworth and Chambers Co., supra.*[25] It might plausibly be argued that the States

[25] The decisions in the above cases can be read more narrowly. One possible reading is that Section 14(b) does not empower the States to enforce their restraints in circumstances where the conduct involved, though violative of State law, would also arguably constitute an unfair labor practice under the National Labor Relations Act. If, as we shall argue (*infra*, pp. 47–56), conduct which falls within the proviso does not become an unfair labor practice merely because it breaches State law, this interpretation of *Farnsworth* and *Curry* would mean that a

have no jurisdiction over peaceful strikes and picketing under any circumstances, but are limited to barring, punishing and redressing the actual execution of union-security contracts and discharges thereunder. In this view both the employer and the union could be

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State court could enjoin the discharge of an employee under an agency-shop clause, as in the present case, but that only the Board could adjudicate a discharge pursuant to a closed-shop agreement.

The Court arrived at its decision in those cases without the benefit of full briefs on the effect of Section 14(b), and of the *Garner* preemption cases on *Algoma*. *Farnsworth* was reversed on the basis of the petition for certiorari and the opposition thereto; the petition did not discuss Section 14(b) at all, and the opposition, although mentioning that provision, did not analyze the problem but merely asserted that the matter was settled by *Algoma*. See Petition for Certiorari and Opposition in *Local Union 429, Electrical Workers* v. *Farnsworth and Chambers Co.*, No. 891, October Term 1956. The Court heard argument in *Curry*, but the briefs that were filed dealt principally with the "final order" problem. The brief for the petitioner does not discuss Section 14(b) at all, and, although the brief for the respondent does, the problem is not analyzed in depth and the chief reliance is placed on cases which do not involve a preemption question for there was no claim that the businesses involved were subject to the Board's jurisdiction. See Briefs in *Local No. 438, Construction and General Laborers' Union* v. *Curry*, No. 87, October Term 1962.

As this Court recognized in *San Diego Building Council* v. *Garmon*, 359 U.S. 236, 241, the decisions in the preemption field have been worked out "in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations," and hence "language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have evolved." See also the Court's comment on *Auto Workers* v. *Wisconsin Board*, 336 U.S. 245 (359 U.S. at 245, n. 4).

enjoined from executing the unlawful contract and punished for any criminal violation. If the union compelled an unlawful discharge, it could be prosecuted with the employer as an aider and abettor, and held liable as a joint tort feasor.

This interpretation would leave theoretically open the somewhat incongruous possibility that a State might enjoin an employer from executing a union shop contract yet be powerless to prevent the union from using economic pressure to compel him to violate the decree or to punish him for complying with the statute. The anomaly is more apparent than real. If the union were in fact pressing for the employer to hire only union men, or to execute a union-shop contract even though it had not been designated as the bargaining representative, the national Board would have jurisdiction to deal with its activities as violations of Section 8(b)(2), for its conduct would not meet the conditions expressly stated in the proviso to Section 8(a)(3). If the union were the bargaining agent and were actually insisting upon a union-security contract prohibited by State law, the Board almost surely could grant the employer relief under Section 8(b)(3) on the ground that the union was refusing to bargain in good faith. Compare *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 349.

Drawing the line at this point would resolve another difficulty. Controversies are likely to arise over whether a contract clause demanded by a union is subject to State regulation by virtue of Section 14(b) because it is an agreement "requiring membership in

a labor organization as a condition of employment"; for example, a check-off, hiring hall or true service fee.[25] There would be serious danger of interference with national policy if a State tribunal were permitted to interfere with the course of bargaining between an employer and the representative of his employees upon the ground that it was likely to terminate in a violation of State law, prior to any national determination of whether the contract was in fact within the area left open to State control. Confining to the national Board the scrutiny of demands and other conduct in the course of bargaining would minimize the danger of interference with the national policies declared in the Act and usually give the courts the benefit of a prior determination by an expert agency, without curtailing State power to deal with the actual execution and application of unlawful contracts. Even an injunction against the execution of a specific contract would be far less damaging than intrusion into the course of negotiations and any use of economic weapons.

A second, but less satisfactory, solution would be to allow the States to protect their citizens against pressures to induce the immediate execution of an illegal agreement by confining the preemption rule to cases in which the objective of the strike or picketing is disputed, while leaving the States free to deal with conduct *unequivocally aimed* at an *immediate violation* of State law. Where Congress has left a State free to

[25] For Board decisions in such areas, see *H. J. Homan Co.*, 137 NLRB 1043; *Houston Chapter, Associated General Contractors*, 143 NLRB No. 43, 53 LRRM 1299.

prohibit racial discrimination in employment (see *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714), it would seem anomalous for Congress to prohibit the States from protecting employers against economic reprisals for failing to discriminate. Similarly, one might well argue that, having the undoubted power to regulate substantive terms and conditions of employment, the States must also have been left with power to deal with strikes and picketing unequivocally intended to accomplish an immediate violation.[27] The recognition of that jurisdiction could do little damage to the national labor policy. On the other hand, to allow a State agency to find the facts in the melange of a labor controversy or to deal with remote objectives that might well be abandoned as collective bargaining developed, would create the very kind of danger that the *Garner* rule was intended to avoid.

Thus, without prejudging future cases, it is clear that the opportunities for separating State jurisdiction over the actual execution and application of union-security contracts from the Board's exclusive jurisdiction over concerted activities are more than adequate to demonstrate that the recognition of State power in the former instance carries no serious threat to implementation of national labor policies in the latter sphere. For the same reason, there is no inconsistency between the sustaining of State jurisdiction in *Algoma Plywood Co.* v. *Wisconsin E.R. Board*, 336 U.S. 301, which involved an actual discharge

[27] The above view is expressed in Cox, *Federalism in Labor Laws*, 67 Harv. L. Rev. 1297, 1325–1326.

under an existing union-security agreement and the *Farnsworth* and *Curry* cases which involved picketing for remote and uncertain objectives in a controversy over union organization.[21] All the more clearly, there is no inconsistency with the line of authorities exemplified by *Garner* v. *Teamsters Union*, 346 U.S. 485, and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, insofar as employee and union activities are concerned.[22]

2. *The framing of divergent State remedies for the actual "execution or application" of a union security contract in violation of State law will not interfere with the national labor policy.*

The exclusivity of the jurisdiction of the National Labor Relations Board, including the exclusivity of its remedial powers, rests upon the need for ensuring that the substantive rules laid down by Congress are

[21] The holding in *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950), that the Wisconsin Board lacked jurisdiction to remedy the discriminatory discharge of an employee employed by a company subject to the NLRA, is not inconsistent with *Algoma*. *Plankington*, unlike *Algoma*, did not involve State enforcement of its union security policy, for, although the union and the company had a maintenance of membership agreement, it was not invoked as the basis for the discharge; hence, the State action in *Plankington* was not within the area of union security which Congress had carved out for the States, but within the field preempted by the NLRA. See Brief for the National Labor Relations Board as *Amicus Curiae*, *Plankington Packing Company* v. *Wisconsin Employment Relations Board*, No. 419, October Term 1949, pp. 15–17, 24–25. See also *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 390, n. 12 (1951).

[22] The impact of *Garner* and *Garmon*, if State law is read into the proviso to Section 8(a)(3), is discussed *infra*, at pp. 43–47.

given uniform application. As this Court declared in *Garner* v. *Teamsters Union*, 346 U.S. 485, 490:

> *Congress did not merely lay down a substantive rule* of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application *of its rules* to a specific and specially constituted tribunal * * * Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain *uniform application of its substantive rules* and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * * [Emphasis added.]

Thus, the doctrine of exclusive jurisdiction presupposes that the substantive law to be applied is the uniform national law prescribed by Congress.

In the field of union security, the controlling substantive regulations admittedly may be fashioned, not by Congress, but by the several State legislatures. In this area, Congress chose to do without uniformity. Section 14(b) permits the States to adopt restrictive legislation expressing a variety of local attitudes and philosophies on the subject of compulsory unionism. Making the exception may tend to impair other parts of the national labor policy, but diversity in matters pertaining to union security contracts is as much a part of that policy as uniformity on other issues.

Nothing in the language or policy of the Act justifies petitioner's insistence that those diverse State policies be implemented solely (or, indeed, at all) by the specialized machinery set up by Congress to remedy

violations of its own dictates. State remedies are often more elaborate, and in some cases more severe, than those the Board would apply (Pet. Br. 11–12). But it is impossible to believe that Congress was prepared to tolerate local variations in the basic substantive law, yet was unwilling to allow diversity in the much less important matter of remedies. For whereas the substantive law may determine the way in which union security is treated in thousands of collective-bargaining contracts, the remedies are called into play only in the comparatively rare instances in which a violation is established.

Moreover, petitioner's argument depends upon a wholly artificial divorcement of the remedial from the substantive. There is no federal policy in favor of the use of cease-and-desist orders in the abstract, but only as a means for curing violations of the particular substantive prohibitions which Congress laid down in the National Labor Relations Act. By parity of reasoning, where the substantive rules to be applied are those of the States, it is reasonable to conclude that State remedies and procedures should be the means of enforcement.

3. *Even if contracts which violate State right-to-work laws are automatically federal unfair labor practices, concurrent State jurisdiction would not unduly interfere with the Board's administration of Sections 8(a)(3) and 8(b)(2)*

In part II, *infra*, we discuss the question whether conduct which violates a State right-to-work law automatically becomes a federal unfair labor practice under Sections 8(a)(3) and 8(b)(2). We there conclude that the requirements of State law should not be

read into the proviso to section 8(a)(3) and that the jurisdiction of State tribunals to enforce State right-to-work prohibitions should be exclusive. We now demonstrate that, even if a union security contract banned by the State does lose the protection of the proviso and thereby come within the cognizance of the Board, the exercise of concurrent jurisdiction by State courts would not unduly impede the Board's administration of sections 8(a)(3) and 8(b)(2).

Although the danger of diverse or conflicting adjudications upon identical facts is ordinarily to be avoided, a ruling that a union-security contract which violates State law is not privileged for the purposes of Sections 7 and 8 would not compel the conclusion that Congress intended to deprive the States of jurisdiction to enforce the right-to-work laws which it concededly left them power to enact.

The exercise of concurrent jurisdiction by State courts over conduct which might also fall within the Board's domain is not so unusual a departure from the general scheme of the Act as to cast doubt upon the existence of that jurisdiction in the present instance. It is well settled, for example, that State courts, applying State tort law or criminal statutes, may enjoin, exact damages, or impose penalties for conduct which involves violence or threats of violence, even though the same conduct would also constitute an unfair labor practice under Section 8(b)(1)(A).[30]

[30] It may also be noted that, under Section 14(c), the States may apply their own laws to businesses over which the Board, for policy reasons, declines to assert jurisdiction. In these instances, there is no concurrent jurisdiction, the Board in effect having ceded its power over the subject to the States.

United Construction Workers v. *Laburnum Construction Corp.*, 347 U.S. 656; *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131. Similarly, a person injured as a consequence of secondary activity banned by the federal Act may recover damages in either a State or federal court under Section 303 even though the Board would also have jurisdiction to administer a remedy for the same conduct under Section 8(b)(4). *Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237. Moreover, both State and federal courts have power to adjudicate controversies involving the breach of collective-bargaining agreements, notwithstanding that the offending conduct would also amount to a violation of the Act. *Smith* v. *Evening News Assn.*, 371 U.S. 195. In all of these situations, the aggrieved party has a choice between bringing suit in a State (or federal) court or lodging a complaint with the Board, or both. In each case the outcome, as well as the remedy, may be different, depending on which tribunal is selected. If the controversy is brought before both forums, either by the same or different grievants, there may in some circumstances be conflicting results or cumulative remedies. In the case of "violence," moreover, there are the additional possibilities that the State court might restrain conduct which the Board would protect, or might impose sanctions more severe than those the Board, or another State court, would be empowered or disposed to apply.

In the face of these examples, the possibility of inconsistent or diverse findings in a controversy over a union-security contract is not persuasive that Con-

gress, despite all the history to the contrary, must have intended to have deprived the States of power to apply State remedies for violations of applicable State law.

II

THE EXECUTION AND APPLICATION OF A COLLECTIVE BARGAINING AGREEMENT THAT SATISFIES THE CONDITIONS OF THE PROVISO TO SECTION 8(a)(3) IS NOT A FEDERAL UNFAIR LABOR PRACTICE EVEN IF IT VIOLATES STATE LAW

The normal rule where State and federal governments have concurrent powers of regulation is that each enacts and administers its own law. One would suppose that if Congress had wished to establish a different arrangement for dealing with union-security contracts it would have expressed that novel intention in plain words.

The spontaneous understanding of Section 14(b), however, is only that it prevents any employer or labor union from defeating the normal application of a State law prohibiting union-security agreements by claiming that the agreement was "authorized" by federal law. There is no intimation that it affects the federal unfair labor practices.

That reading is confirmed by the legislative history. (See pp. 16–26, *supra*.) The choice of "authorized," as explained *supra*, pp. 14–15, is readily explained by the reasoning in *Hill* v. *Florida* and the fact that section 9(e)(1) of the Taft-Hartley Act originally directed the Board to conduct elections to determine whether a majority of the employees desired "to authorize" the bargaining representative to negotiate a

union-security agreement. The natural place to put any qualification requiring a contract to comply with State law in order to satisfy the proviso to Section 8(a)(3) was in the proviso itself.

We must concede, nevertheless, that the words will bear the construction that makes a discharge under a union shop contract that violates State law, but otherwise satisfies the proviso to section 8(a)(3), a federal unfair labor practice. Section 7 describes agreements qualifying under the proviso as "authorized in section 8(a)(3)." Hence, when Section 14(b) states that nothing shall be deemed as "authorizing" such contracts where prohibited by State or Territorial law, it may mean that they are not "authorized" for the purposes of Sections 7, 8(a) (1) and (3), and 8 (b)(2). There is no inconsistency between that interpretation and the additional conclusion that under such circumstances the contracts are not "authorized," in the sense that they are not protected against prosecution by the State.

Moreover, the view that a federal unfair labor practice is created would benefit individual employees aggrieved by violation of State right-to-work laws by making the services of the National Labor Relations Board available as investigator and prosecutor without private expense.

It is also plain that there are other occasions upon which the Board is required to take State law into account in deciding whether an employer's or union's conduct is an unfair labor practice. For example, where an employer is charged under Section 8(a)(5) with a refusal to bargain in good faith about a union-

shop clause, it may be a complete defense that the proposed agreement is proscribed by a State right-to-work law. "[I]t is not incompatible with good faith in bargaining," to refuse to discuss a contract provision which the employer justifiably feels might bring him "into conflict with the State legal authorities." *Fort Industry Co.*, 77 N.L.R.B. 1287, 1299[11] (1948). A union which goes on strike to enforce its demand for a union shop prohibited by State law—a subject which, as indicated, is non-bargainable—may well be guilty of a refusal to bargain under Section 8(b)(3). For "good faith does not license [a party to collective bargaining] to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining." *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 349. An employer accused of violating Section 8(a)(1) by discharging an employee for participation in a strike to secure an impermissible union-shop agreement may perhaps exculpate himself by showing that the strike sought to compel him to engage in an act illegal under State law, for the objective might well deprive the employee's conduct of the status of protected "concerted activity" under Section 7 and thereby exonerate the employer under Section 8(a)(1). See Cox, *The Right To Engage in Concerted Activity*, 26 Ind. L. J. 319, 341–343.

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[11] Presumably, the ruling depends upon the precise facts. If the union contends in good faith that the proposed contract is not illegal, the employer could hardly excuse an outright refusal to discuss the question.

However, such situations are quite unlike the instant case. In each of the foregoing instances there would be the same necessity for taking State law into account if the union's demand were for a very different kind of provision illegal under a State statute, such as a clause guaranteeing men a wage differential for the same work as women in violation of an equal pay law, or a seniority system discriminating against men over 60 years of age in violation of a statute prohibiting discrimination because of age against men under 65. State laws provide part of the context of substantive regulation of terms and conditions of employment within which the employer and union conduct their relations. In the examples cited, the Board merely takes that context into account in applying, to the particular facts before it, such uniform federal concepts as "concerted activities" and "bargain in good faith." The Board neither has nor exercises power directly to deal with violations of State laws as unfair labor practices; consequently, the analogies do not support the view that it is given that assignment in the case of State right-to-work laws by Sections 14(b) and 8(a)(3).

In *Giant Food Shopping Center, Inc.*, 77 N.L.R.B. 791, the National Labor Relations Board did indeed hold that it would not conduct a union authorization election under Section 9(e)(1) in a bargaining unit covering two States, one of which had enacted a right-to-work law. The Board's principal reason for reaching this conclusion was that an election, the sole purpose of which was to authorize the union to negotiate

a union-shop contract, would not only "serve no useful purpose" but "would lead only to the circumvention and frustration of State law, a result that Congress clearly did not intend as evidenced by its enactment of Section 14(b)." *Id.* at 795. Elsewhere in the opinion (pp. 794–795), however, the majority said that—

> if the employer and the union, acting pursuant to the authority conferred by a Board-conducted union-shop election, should enter into a union-shop agreement notwithstanding the prohibitions of a State law, the Board might well be placed in the position of having to accept the union-shop agreement as a defense to an unfair labor practice complaint alleging discriminatory discharges in violation of the Act. * * *

And Chairman Herzog, with whom Member Houston concurred in dissent, taxed the Board with having held that (pp. 797–798)—

> a State offense becomes, *ipso facto*, a Federal offense. Any employer who discharges an employee within a prohibiting State pursuant to a union-shop agreement, and any labor organization that contributes to that result, not only violates the State enactment but also violates Sections 8(a)(3) and 8(b)(2) of the Labor-Management Relations Act, simply because this Board, by declining to conduct a referendum pursuant to Section 9(e) of that Act, makes it impossible for them to put themselves in compliance with Federal law. * * *

The *Giant Food* case comes closest of all the Board's decisions to holding that the proviso to Section 8(a)(3) is inoperative in States which have prohibited union-security contracts, and thus leaves any discharge pursuant to such a contract unlawful under Section 8(a) (1) and (3) and Section 8(b)(2).[na] The decision is not a precedent for that conclusion, however, both because it was enough for the purposes of the case to hold that the Board would not make its processes available under Section 9(e)(1) where the only effect could be a violation of State law, and because the requirement of holding a union authorization election in order to satisfy the proviso, has since been repealed. Act of October 22, 1951, 65 Stat. 601.

Although the Board has never passed upon the question in a contested case, we are persuaded that conduct which violates a State right-to-work law but fully complies with the national labor policy would not be an unfair labor practice under Sections 8(a) (1) or (3) or Section 8(b)(2). The accepted practice of using the processes of the Board to enforce federal policy and leaving the enforcement of State right-to-work laws to the States is supported by a number of cogent considerations:

(i) It is inherently unlikely that Congress would have wished to make the federal agency an instrument of State policy. The Board was created for the purpose of interpreting and carrying out uniform national policy. Cf. *Labor Board* v. *Hearst Publications, Inc.*, [redacted] 322 U.S. 111. It was not estab-

[na] See, however, *Northland Greyhound Lines*, 80 NLRB 288, *Western Electric Co.*, 84 NLRB 1019, *Cyclone Sales Co.*, 115 NLRB 431, 432.

lished for the purpose of implementing, either alone or concurrently, the diverse labor policies of the States. The union shop and the agency shop do not contravene any substantive federal policy; Congress made no judgment that those arrangements were undesirable. On the contrary, the proviso clearly disclaims a policy hostile to forms of compulsory unionism other than the closed shop. And while it left the door open to the States to adopt more restrictive policies, there is no reason to suppose that Congress intended the centralized machinery of the NLRB to become the instrument of policies that it had determined to reject. Accordingly, for the Board to act as an enforcement agency for State laws which go farther than the federal law in restricting the union and agency shops would be to undertake a role entirely alien to its normal function under the Act. Nor would it leave the federal government merely indifferent with respect to right-to-work laws. The addition of federal administration and federal sanctions would give them respectability and support in place of toleration.

(ii) Nothing in the legislative history indicates that Congress intended to put federal sanctions behind State laws. Under the Wagner Act it was plain, as petitioner concedes (Br. p. 25), that State law could not possibly be read into the proviso, because there was no provision like Section 14(b). The Board enforced the national policy. State laws dealing with union security were administered by the States. Had a change been intended, it would have attracted some comment. On the Senate side, however, Senator Taft, as we have seen (*supra*, p. 24), stressed that

Section 14(b) did nothing more than make explicit what was already implicit in the Wagner Act—"that the proviso in Section 8(3) was not intended to override State laws regulating the closed shops" (*i.e.*, union-security agreements). The Senate had not thought it necessary to include such a provision in its own bill, and Senator Taft assured his colleagues that "in putting in this express provision from the House bill, we in no way change the bill as passed by the Senate * * * (*supra*, pp. 24–25).

Section 8(d)(4) of the House bill, the original version of the amendment banning the closed shop but permitting the union shop, did specifically provide that union shop agreements "shall not constitute or be evidence of an unfair labor practice * * * (if such provisions are not in conflict with the law of any State in which the agreement is to be carried out.)"[28] Commenting on this provision, the House Report stated:[29]

> The bill bans the closed shop. Under carefully drawn regulations it permits [the union shop]. Such agreements are lawful, however, only if the employees by secret ballot have selected the union as their bargaining agent, and if the majority of all the employees, by a separate secret ballot, authorize the union to enter into the agreement, *and if the agreement is not prohibited by State law.* [Emphasis added.]

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[28] Section 8(d)(4) of H.R. 3023, 80th Cong., 1st Sess., 1 Leg. Hist. (1947) 183–184.

[29] H. Rept. No. 245, 80th Cong., 1st Sess., 9, 1 Leg. Hist. (1947) 300. See also *id.* at 34, 1 Leg. Hist. (1947) 325.

Under that bill compliance with State law would undoubtedly have been necessary to gain the benefit of the proviso.

But the Congress did not adopt Section 8(d)(4) as drafted in the House; it chose instead the language from the Senate bill that is now found in Section 8(a)(3). The House Conference Committee report explains the choice on other grounds,[34] but the failure to follow the example of the House bill by including a reference to legality under State law in the proviso itself—the obvious place for it—confirms the inference that none was intended. Section 14(b) replaced Section 13 of the House bill, which was aimed only at ensuring State jurisdiction over union-security agreements even in industries affecting commerce. Both the House and Senate explanations speak only of the intent to preserve State jurisdiction. See pp. 20–26, *supra*.

(iii) The compelling evidence (pp. 16–26; *supra*) that Congress intended the States to have jurisdiction to enforce their own laws prohibiting union-security agreements adds strength to the foregoing considerations. Whatever advantages might be claimed for having State prohibitions enforced exclusively by a centralized federal agency, are absent if the State courts have current power to adjudicate controversies involving union-security agreements. Indeed, on the latter assumption, it is difficult to see what conceiv-

[34] The Report states that the language of the Senate provision was adopted because it contained a procedure for securing the union shop which was deemed preferable to that contained in the House bill. H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41, 1 Leg. Hist. (1947) 545. See also pp. 50–51 of that Report, 1 Leg. Hist. (1947) 554–555.

able objective of national labor policy would be served by adding the sanctions of the Board to sanctions already available in the State courts for the enforcement of State laws more restrictive than national policy. Concurrent jurisdiction would inevitably give rise to the possibility of diverse or conflicting adjudications on the same facts. That consideration is hardly decisive, but in the absence of compelling evidence, either in the language or history of the Act, that Congress intended the Board to have jurisdiction, wise policy requires avoiding the possibilities of conflict. Since Congress clearly intended the States to have jurisdiction, conflict can be minimized only by the Board's confining itself to enforcement of the direct federal prohibitions.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bar-

gaining unit covered by such agreement when made, and if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:[1] *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *

SEC. 9(e):

(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit,

[1] This provision was modified in 1951; 61 Stat. 144.

upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3)(ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.[1]

* * *

SEC. 14. * * *

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[1] This provision was modified in 1951, 61 Stat. 144.

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